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OCT 30 1992

Before the
Federal Communications Commission
Washington, D.C. 20554
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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In re:)
)
Petition by In-Flight Phone Corp.)
for Acceptance of Application Or,)
Alternatively, Waiver of)
Section 1.402(c) of the Rules To)
Permit Consideration of an)
Application for Pioneer's)
Preference for Airline Audio)
Service in the 900 MHz Band)

ET Docket No. 92-100

To: The Commission

PETITION FOR ACCEPTANCE OF
APPLICATION OR RULE WAIVER

by

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October 30, 1992

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PETITION FOR ACCEPTANCE OF
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In-Flight Phone Corp. ("In-Flight") holds an experimental license to provide a live audio news, information, and entertainment service to airline passengers using land-based transmitters operating between 901.75-902.00 MHz and 940.75-941.00 MHz. Although the FCC set June 1, 1992 as the deadline for filing pioneer's preference applications for certain types of services operating in these bands, it set no filing deadline for an application seeking a preference for the service In-Flight has developed. This petition, which requests acceptance of In-Flight's concurrently tendered application, is being filed simply to make sure that the Commission understands that it would be unlawful not to accept the In-Flight preference application.

I. SUMMARY OF ARGUMENT

Applicable Commission policy is designed to limit the grant of pioneer's preferences to those innovators whose efforts to develop a new service were undertaken on their own initiative rather than as a result of a proposal by the agency to allocate frequency bands for that service. Procedures to implement this policy are set forth in Commission rules under which the agency first establishes a deadline for filing pioneer's preference applications by those proposing to provide a particular communications service for which spectrum has not yet been allocated. That deadline is set forth in a public notice which the Commission normally issues when it decides that the commencement of a rulemaking to allocate spectrum for such service may not be far off. Under Section 1.402(c) of the Commission's Rules, the announced deadline must be at least 30 days prior to the issuance of a formal notice of a proposed rulemaking ("NPRM") pursuant to which the Commission expects to establish the new service identified in the public notice.

In the present case, the Commission's public notice released April 30, 1992 (the "April Public Notice" or "Public Notice" or "Notice") established a June 1, 1992 deadline for filing pioneer's preference applications for "narrowband mobile data and paging services" in certain frequency bands. Shortly after that deadline -- on August 14, 1992 -- the Commission issued an NPRM proposing that those bands be used not just for the purposes described in the April Public Notice but also for any and all narrowband mobile services, including In-Flight's live audio news, information, and

entertainment service. The Commission's April Public Notice thus gave neither actual nor constructive notice that the August NPRM would be expanded to include an audio service for airline passengers employing entirely different technology and hardware -- and aimed at an entirely different set of users -- than the mobile data and paging services identified in the Public Notice.

Because of the circumstances described above, the FCC should conclude that no deadline has been established for the filing of the pioneer's preference application hereby tendered by In-Flight and, therefore, that the application is in full compliance with Section 1.402(c). At the very least, the Commission should waive this rule because acceptance of In-Flight's application will not undermine the Commission's objective, as reflected in the pioneer's preference rules, to promote entrepreneurial innovation leading to the development of new communications services.

II. BACKGROUND

In May 1991, the Commission announced the adoption of "pioneer's preference" regulations to stimulate development of innovative communications services.^{1/} Those regulations are codified in Sections 1.402, 1.403, and 5.207 of the agency's rules.

About four months after the adoption of these rules, In-Flight filed an application for an experimental license to provide airline passengers with a live audio news, information, and entertainment service operating on spectrum in the 901-902 MHz and 940-941 MHz

^{1/} Report and Order in GEN. Dkt. No. 90-217, 6 FCC Rcd. 3488 (1991), recon. 7 FCC Rcd. 1808 (1992).

bands.^{2/} At about the same time, it filed a petition for rulemaking proposing that these bands be reallocated from the General Purpose Mobile Service to an airline audio service of the sort described in the experimental license application.^{3/} In-Flight stated in its petition that it intended to file an application for a pioneer's preference under the newly adopted rules.^{4/}

On February 21, 1992, the FCC granted In-Flight an experimental license on the terms it had sought. However, it dismissed In-Flight's petition for rulemaking without prejudice so that In-Flight could seek informally to resolve a concern expressed by NTIA --, that certain Navy radars might interfere with the In-Flight service -- instead of requiring the FCC to address that concern in a rulemaking proceeding.^{5/} NTIA later notified the FCC that this issue had been resolved because In-Flight had agreed not to object if the FCC proposed -- in any rulemaking issued to create the service proposed by In-Flight -- that licensees must accept interference from the subject radars.^{6/} In-Flight decided to delay refiling a petition for rulemaking until after it began providing

^{2/} The application and all subsequently filed documents connected with the application are in FCC File No. 2234-EX-PL-91.

^{3/} Pet. for Rulemaking (filed Sept. 10, 1991).

^{4/} Id. at 1 n.2.

^{5/} See letter from Thomas P. Stanley to Rodney L. Joyce (CN910178, Oct. 1, 1991).

^{6/} See letter from Richard D. Parlow to Thomas P. Stanley (Jan. 17, 1992).

service under its experimental license so that it could give the Commission information about the progress of the experiment in order to help the agency decide whether to reallocate the subject spectrum to the new service which In-Flight proposed.

On April 30, 1992, the FCC issued the April Public Notice announcing that June 1, 1992 would be the final day for filing pioneer's preference requests for "narrowband mobile data and paging services" operating in three 900 MHz bands, including the two bands in which In-Flight's experimental airline audio service will operate.^{7/} A few weeks after this filing deadline had expired, the Commission adopted an NPRM proposing to reallocate these three bands not only for narrowband paging and data services but also for any narrowband mobile service, including the airline audio service to be provided by In-Flight under its experimental license.^{8/} Prior to actual adoption of this NPRM, In-Flight had no reason to believe that the NPRM would propose to allocate spectrum for In-Flight's proposed service.

^{7/} See "Deadline to File Pioneer's Preference Requests [for] 900 MHz Narrowband Data and Paging", Pub. Notice No. 22922 (April 30, 1992). The bands to which this filing deadline applied are 901-902 MHz, 930-931 MHz, and 940-941 MHz. As indicated above, In-Flight's experimental service will operate on a small part of the first and third of these bands (901.75-902.00 MHz and 940.75-941.00 MHz).

^{8/} Notice of Prop. Rulemaking and Tent. Decision in GEN. Dkt. No. 90-314 and ET Dkt. No. 92-100 (rel. Aug. 14, 1992). In-Flight will submit comments in response to this NPRM explaining why In-Flight's experimental service is encompassed within the narrowband mobile service defined in the NPRM.

III. ARGUMENT

A. In-Flight's Tendered Application Should Be Accepted Because No Deadline Was Established for Seeking a Pioneer's Preference for the Type of Service In-Flight Proposes

It is axiomatic that the FCC may not lawfully ignore its own rules:

[I]t is elementary that an agency must adhere to its own rules and regulations. Ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned. . .for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action. Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated, consistent with applicable statutory requirements, is required of those to whom Congress has entrusted the regulatory missions of modern life.^{2/}

Rejection of In-Flight's pioneer's preference application on the ground that In-Flight failed to file the application by the June 1 deadline set by the April 30 Public Notice would violate the requirement that the FCC comply with its own rules. Section 1.402(c) requires the Commission to accept an application seeking a pioneer's preference for a particular service as long as the application is filed before any filing deadline which the FCC has set for applications relating to such services. While the April 30 Public Notice set a June 1 filing date for "narrowband data and paging services" operating in the bands that In-Flight's experimental service will operate, neither that public notice nor

^{2/} Reuters Ltd. v. FCC, 781 F.2d 946, 950-51 (D.C. Cir. 1986).

any other one has set a filing deadline for airline audio services.^{10/}

B. At the Very Least, the Commission Should Waive
Section 1.402(c) To Permit the Filing of
In-Flight's Application

Even if the Commission could lawfully ignore Section 1.402(c) of its own rules by rejecting In-Flight's application on the basis of its April Public Notice -- which it cannot do -- the agency still would be required to waive the rule and accept the application because the rationale for applying the June 1 filing deadline set by that Notice is not applicable in this case. In WAIT Radio, the court held that the FCC may not lawfully refuse to waive an agency rule in any situation where the rationale for the rule does not apply:

"[A] general rule, deemed valid because its overall objectives are in the public interest, may not be in the 'public interest' if extended to an applicant who. . .[shows that in a particular case waiver] will not undermine the policy[] served by the rule. . .
."^{11/}

The assumption underlying the above-described time limitation on the filing of pioneer's preference applications is that innovation will occur after issuance of the public notice announcing the filing deadline without the stimulus of licensing preferences because potential innovators will know as of the date

^{10/} "Deadline to File Pioneer's Preference Requests", supra n.7.

^{11/} WAIT Radio v. FCC, 418 F.2d 1153, 1557 (D.C. Cir. 1969), cert. denied 409 U.S. 1027 (1972).

of that public notice of the FCC's intention to allocate spectrum for the service described in the public notice:

"Our rationale for imposing a deadline at the NPRM issuance stage for receipt of preference requests is that until we make a proposal an innovator may submit a rulemaking petition or preference request that may become the foundation for our proposal, but after the NPRM is adopted the nature of the proposed new service ^{or} technology essentially is defined."^{12/}

It is clear that the Commission never put innovators on notice of the agency's intention to create a communications service of the type which In-Flight will provide pursuant to its experimental license. First, as explained above, the Commission gave no indication in the April Public Notice that the filing deadline applied to In-Flight's service since the Notice specified a June 1, 1992 deadline only for applications for "narrowband data or paging services" in the three relevant 900 MHz bands.^{13/} Consistent with this interpretation, a subsequent public notice disclosed that the FCC had accepted for filing seven applications for pioneer's preferences in the three subject bands because these applications requested preferences for various "narrowband data and paging" services.^{14/} Similarly, while the agency stated in the notice of inquiry leading to the August NPRM that the Commission might

^{12/} Memo. Op. and Order in GEN. Dkt. No. 90-217, supra, 7 FCC Rcd. at 1811.

^{13/} "Deadline to File Pioneer's Preference Requests", supra n.7.

^{14/} "Pioneer's Preference Requests Accepted in ET Dkt. No. 91-100", Pub. Notice Rel. No. DA-712 (June 4, 1992).

propose therein a reallocation to second generation cordless telephone service of the two bands which In-Flight will use to provide its experimental service,^{15/} it gave no indication that the NPRM would propose the creation of a narrowband mobile service encompassing In-Flight's experimental service.^{16/} At no other time prior to the adoption of the August NPRM did the FCC put In-Flight on notice -- even constructively -- that it would propose rules in the NPRM governing In-Flight's proposed service or that In-Flight would be required to submit its pioneer's preference application for such service by June 1 in order for it to be considered.

Even had there been reason to speculate prior to release of the August NPRM -- which there was not -- that the FCC might propose in that NPRM to reallocate the relevant 900 MHz bands to a narrowband mobile service encompassing the service proposed by In-Flight, there still is no basis to enforce against In-Flight the filing deadline which was set pursuant to Section 1.402(c). All of the innovation which has occurred in the development of this service to date is the result of In-Flight's own initiative rather than any hint by the FCC that it might propose to create this

^{15/} Notice of Inquiry in GEN. Dkt. No. 90-314, 5 FCC Rcd. 3995, 3997 (1990).

^{16/} The Commission also implied obliquely in the notice of inquiry that the NPRM might propose the reallocation of these two bands to the existing Private Land Mobile Radio Service or to a mobile data service. It did so by noting that it had received petitions for rulemaking proposing to allocate these bands to these two services and stating that it would consider these allocation proposals in adopting its NPRM. Id., 5 FCC Rcd. at 4000 n.14.

service. In-Flight filed an experimental application to provide the service more than seven months before the April Public Notice announced the deadline for filing pioneer's preference applications involving services to which the August NPRM applies. Moreover, at about the time In-Flight filed an application for an experimental license, it also filed a petition for rulemaking proposing that the FCC allocate part of the 901-902 MHz and 940-941 MHz bands for this service and stated in this petition that it intended to file an application for pioneer's preference. Finally, as of the June 1, 1992 deadline for submitting applications for pioneer's preference, In-Flight was actively working with Harris Aerospace Systems Division on the development of the equipment necessary to provide the experimental service, and this work led In-Flight to award Harris a \$4.7 million contract to help develop equipment necessary to provide this service.

IV. CONCLUSION

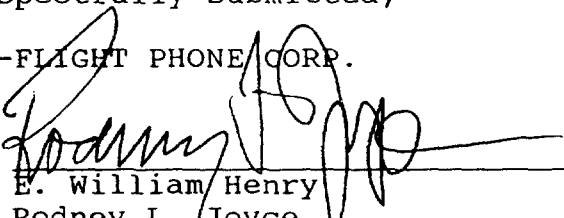
The Commission should conclude that no deadline has been established for the filing of a pioneer's preference application for the service proposed by In-Flight and that the application is thus in full compliance with the requirement in Section 1.402(c) that applications must be filed prior to any such deadline. Alternatively, the filing deadline should be waived because the

rationale for that deadline is inapplicable in the case of
In-Flight.

Respectfully submitted,

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